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Nos. 81-150 and 81-546

In The Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,

Appellant,

v.

MARATHON PIPE LINE COMPANY and
UNITED STATES OF AMERICA,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

v.

MARATHON PIPE LINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLEE MARATHON PIPE LINE COMPANY

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QUESTION PRESENTED

Whether, under 28 U.S.C. §1471(c) of the Bankruptcy Reform Act of 1978, bankruptcy judges whose tenure and compensation do not meet the requirements of Article III of the Constitution may constitutionally exercise nationwide personal jurisdiction, conduct jury trials, and enter and enforce judgments within the states in disputes between private parties based upon common law and state or federal statutory claims?

Rule 28.1 list of appellee's parent companies, subsidiaries and affiliates: Marathon Oil Company (parent company).

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In sum, Congress' decision to constitute the new bankruptcy courts as adjuncts to the district court is a decision premised on the long-established system of adjunct referees and complies in all respects with the requirements of Article III.[29]

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[29] The only court decision of which we are aware that has considered this question, apart from the district court below, has rejected an Article III challenge to the Bankruptcy Act of 1978. See *In re Segarra*, 14 Bankr. Rep. 870 (D. P.R. 1981).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLEE MARATHON PIPE LINE COMPANY

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at Motion to Affirm, 2, 3, la-15a. The opinions below and jurisdiction of this Court are set forth in the Brief for the United States at 1, 2.

STATEMENT OF THE CASE

Proceedings Below

On March 8, 1979, Northern Pipeline Construction Company (hereinafter "Northern") instituted a lawsuit against Marathon Pipe Line Company (hereinafter "Marathon"), pursuant to 28 U.S.C. §1332, in the United States District Court for the Western District of Kentucky for claims arising out of a contract between the parties involving the construction of a pipeline in Kentucky. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, No. C-79-0110-L(B), (W.D. Ky.). On January 14, 1980, Northern filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern filed in the Bankruptcy Court a complaint against Marathon, in which it alleged the same contract claims against Marathon that Northern had asserted in the lawsuit pending in the Western District of Kentucky, with the exception of a claim for mechanic's lien relief. Northern sought to enforce claims for monies allegedly due under written contracts and for changes and additional work on the pipeline and to recover damages for alleged breaches of contract and warranty, misrepresentations and economic coercion and duress. (J.A. at 6). The claims are all governed by state law. Northern claimed jurisdiction in the bankruptcy court under 28 U.S.C. §1471. (J.A. at 6).

Marathon responded by moving for dismissal of Northern's complaint on the ground that the grant of jurisdiction to the non-Article III bankruptcy referee in 28 U.S.C. §1471(c) is unconstitutional. The bankruptcy judge denied Marathon's motion (Gov. J.S. App. (hereinafter "J.S. App") 27a-36a) and Marathon appealed to the district court pursuant to Bankruptcy Reform Act of 1978, Title IV, Section 405(c), 92 Stat. 2685 (hereinafter "Reform Act"). On appeal, the district court dismissed Northern's complaint against Marathon on the

ground that "the delegation of authority in 28 U.S.C. §1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III Judges is an unconstitutional delegation of authority." (J.S. App. 1a-2a.) The United States and Northern timely filed notices of appeal to this Court. Probable jurisdiction was noted on November 9, 1981.

The Bankruptcy Reform Act

The legislative history of the Reform Act is briefly set out in the Government's brief. Brief at 2, 3. After the constitutionality of the exercise of jurisdiction over suits by a bankrupt's trustee against a non-consenting defendant by judges lacking Article III guarantees of life tenure and undiminished salary was questioned during hearings on proposed bankruptcy legislation, Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 2081-84 (1977) (hereinafter "House Hearings") (testimony of William T. Plumb), the House Subcommittee studied the constitutional question and on June 13, 1977 issued a report which concluded that "the text of the Constitution and the case law indicate that . . . Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary." Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Report on Constitutional Bankruptcy Courts, 95th Cong., 2d Sess. 33 (Comm. Print No. 3, 1977) (hereinafter "Subcommittee Report"). On July 14, 1977, the Department of Justice sent a letter and memorandum to the Chairman of the House Committee on the Judiciary stating that, although the Department opposed the creation of independent Article III bankruptcy courts, it had concluded that "the proposed bankruptcy courts cannot be created as Art. I courts." Letter with Appendix of Patricia M. Wald, Assistant

Attorney General for Legislative Affairs, dated July 14, 1977, annexed hereto as Appendix A, at 3a (hereinafter "Justice Dep't. Letter"). Based on the Subcommittee Report and the Justice Department Letter, the Judiciary Committee reported out on July 19, 1977, a bill which provided both for independent bankruptcy courts exercising expanded jurisdiction and Article III status for bankruptcy judges. H.Rep. No. 95-595, 95th Cong., 1st Sess. 3 (1977) (hereinafter "House Report"). When H.R. 8200 came up for consideration by the House, an amendment was adopted eliminating the expanded jurisdiction and Article III status of bankruptcy courts. 123 Cong. Rec. H-11,782-83 (daily ed. Oct. 28, 1977). The bill was then withdrawn from the House floor and sent back to the Judiciary Committee. *Id.* at H-11,783. The Subcommittee on Civil and Constitutional Rights held hearings on the issue of the structure of the bankruptcy court and again concluded that the exercise of extended jurisdiction by bankruptcy courts required Article III judges. Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 2nd Sess., Report on Hearings on the Court Administrative Structure for Bankruptcy Cases (Comm. Print No. 13, 1978). Upon reconsideration by the House, the amendment that eliminated the Article III safeguards was defeated and H.R. 8200 was passed on February 1, 1978. 124 Cong. Rec. H-478 (daily ed. Feb. 1, 1978).

Following hearings in November and December, 1977, before the Senate Subcommittee on Improvements in Judicial Machinery, the Senate passed its own bankruptcy bill, S.2266, which eliminated the life tenure and guaranteed salary protections of the House bill and instead adopted the concept of an independent bankruptcy court created as an "adjunct" to an Article III court. Both extended jurisdiction and the Senate "adjunct" concept were incorporated into the final bill as a result of a series of last minute meetings between

the managers of the bills in both Houses. *See*, K. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L.Rev. 941, 951 (1979); 124 Cong. Rec. H-11,089 (daily ed. September 28, 1978) (remarks of Rep. Don Edwards).

Prior to the enactment of the Reform Act, jurisdiction over bankruptcy matters was vested in and exercised by United States District Courts. Former 11 U.S.C.§§ 1(10), 11. The Reform Act creates a new federal court of record in each judicial district, each of the ninety-two courts denominated a "United States Bankrutpcy Court for the district" (hereinafter "bankruptcy court[s]"). 28 U.S.C. § 151(a); 28 U.S.C. § 451. The bankruptcy courts will come into existence on April 1, 1984. Reform Act, Title IV, § 402(b), 92 Stat. 2682. Judges of the bankruptcy courts are to be appointed by the President, with the advice and consent of the Senate, for a term of fourteen years, 28 U.S.C. §§ 152, 153, and their compensation is indexed to the Federal Salary Act, 2 U.S.C. §§ 351-361, and is subject to review including diminution. 28 U.S.C. § 154. The bankruptcy judges are not only dependent for reappointment upon the President and the Senate, 28 U.S.C. §§ 152, 153, but may be removed without impeachment "for incompetency, misconduct, neglect of duty, or physical or mental disability". 28 U.S.C. § 153(b).

The existing "courts of bankruptcy" are continued during the transition period from the effective date of the Reform Act, October 1, 1979, to April 1, 1984, but the bankruptcy referees appointed prior to the effective date of the Reform Act are fully empowered to act as bankruptcy judges and to exercise all powers and jurisdiction which Congress purportedly conferred on the bankruptcy courts under the Reform Act. Reform Act, Title IV, §§ 404, 405, 92 Stat. 2683, 2684. The referees, whom the Reform Act styles "bankruptcy judges," were appointed by the respective district courts for a term of

six years. Former 11 U.S.C. § 62. The referees' compensation, like that of the bankruptcy judges, is indexed to the Federal Salary Act which allows for diminution. Former 11 U.S.C. § 68; Reform Act, Title IV, § 404 (f), 92 Stat. 2684. In addition, the referees may be removed from office for less than impeachable offenses. Former 11 U.S.C. § 62(b); Title IV, § 404(b) and (d), 92 Stat. 2683-84.

The Reform Act purports to invest the non-Article III judges of the bankruptcy courts, including referees during the transition period, with "the powers of a court of equity, law and admiralty." 28 U.S.C. § 1481; Reform Act, Title IV, § 405(a) and (b). In addition to possessing all the powers of a court of law to enter and execute final judgments in disputes between private parties, bankruptcy courts may fashion new remedies where remedies at law are inadequate and are empowered to enjoin any individual, corporation, or state or federal governmental agency except another court, 28 U.S.C. § 1481. Further, the judges are empowered pursuant to 18 U.S.C. § 401 to punish all civil contempts and even criminal contempts except those "not committed in the presence of the judge of the court" or those "warranting a punishment of imprisonment." 28 U.S.C. § 1481. The bankruptcy judges are explicitly given the power to issue all writs necessary in aid of the bankruptcy courts' expanded jurisdiction, 28 U.S.C. § 1651; to hold jury trials, 28 U.S.C. § 1480; to issue declaratory judgments, 28 U.S.C. § 2201; to issue writs of habeas corpus, 28 U.S.C. § 2256; and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11. 11 U.S.C. § 105(a).

At the same time that the Reform Act grants the bankruptcy judges virtually all the powers of the federal district judges, the Act purportedly grants bankruptcy judges, including interim judges, jurisdiction not only over all cases under Title 11, but over "all civil proceedings...related to cases under title 11." 28 U.S.C.

§ 1471(b). Bankruptcy courts may thereby exercise jurisdiction over any lawsuit to which the trustee or debtor is a party, even though the defendant is not a participant in the bankruptcy proceedings and the claim arises under common law or state or federal statutory law. H.Rep.No. 95-595, 95th Cong., 1st Sess. 49 (1977).

In addition, all bankruptcy proceedings and related cases are completely withdrawn from the supervision and control of an Article III court. The Reform Act nominally vests original but not exclusive jurisdiction of "all civil proceedings . . . related to cases under title 11" in the district courts, 28 U.S.C. § 1471 (b), but then immediately removes "all of the jurisdiction" from the district courts and transfers it to the new bankruptcy courts. 28 U.S.C. § 1471(c). Bankruptcy judges may also exercise a non-reviewable right to remove from any state or federal court to bankruptcy court any civil action "arising in or related to a case under title 11" except a United States Tax Court proceeding or a civil action by a governmental unit to enforce the governmental unit's police or regulatory power. 28 U.S.C. § 1478.

The Reform Act does not guarantee direct appellate review by an Article III court, but rather provides that initial appeals from the decisions of the bankruptcy courts will be to panels of three non-Article III bankruptcy judges appointed by the chief judge of the respective circuit. 28 U.S.C. §§ 160, 1482. If no such appeals panel is designated, the district court shall exercise this appellate jurisdiction. 28 U.S.C. § 1334. The courts of appeals are given jurisdiction of appeals from the appellate panels and the district court. 28 U.S.C. § 1293(a). If the parties agree, a direct appeal to a court of appeals may be taken from a final judgment of a bankruptcy court. 28 U.S.C. § 1293(b). During the transition period parties may also appeal to the district court for the district in which the bankruptcy judge

presides. Reform Act, Title IV, § 405(c)(1)(C), 92 Sta 2685. Unlike prior practice under the Bankruptcy A which until 1973 provided for *de novo* review of refe ees' reports, the appellate courts now must accept th bankruptcy court's findings "unless they are clear erroneous." Bankruptcy Rules 752 and 810; Suggeste Interim Bankruptcy Rules 8001, 8002.[1]

SUMMARY OF ARGUMENT

I

The establishment of ninety-two new non-Article I federal trial courts and potentially eleven new non-Art cle III appellate courts by the Reform Act represen the most drastic restructuring of the federal judici system since the Judiciary Act of 1789. Under th Reform Act, these completely independent bankrupt courts exercise nationwide personal jurisdiction an subject matter jurisdiction over all civil cases previous heard in state and federal courts to which the trustee debtor is a party or which are otherwise related to th bankruptcy proceedings. By permitting the exercise such jurisdiction by non-Article III bankruptcy judge the Reform Act constitutes a radical departure from th Constitution's structure of divided powers. The A compromises the independence of the judicial branch the federal government and thereby establishes a prec dent that would allow further intrusions of uncheck federal power in the states.

Article III, Section 1 of the Constitution guarante life tenure, undiminished compensation, and remov by impeachment for the judges of all inferior feder courts. The bankruptcy judges have not been grant any of the protections mandated by Article III. Th absence of these protections directly contravenes th Framers' attempt to circumscribe the exercise of feder

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[1] Bankruptcy General Order No. 47 which allowed the district co judge to review and re-examine the record and take additional evide was superseded in 1973 by Bankruptcy Rules 752 and 810.

judicial power in the states and to ensure the independence of the judicial branch of the federal government by imposing tenure and salary requirements on all judges of inferior federal courts. Since the exercise of jurisdiction under the Reform Act over suits "related to" bankruptcy proceedings is a form of federal question jurisdiction, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 652 n.3 (1949), the denial to Marathon of an Article III judge is a deprivation of a basic constitutional right. *Glidden Co. v. Zdanok*, 370 U.S. 530, 533, 536-37 (1962).

II.

A. The bankruptcy courts' exercise of expanded jurisdiction cannot be sustained on the ground that it satisfies the requirements of Article III. Although the bankruptcy courts are styled "adjuncts" to the district courts, they in fact exercise all of the district courts' jurisdiction over cases "related to" bankruptcy proceedings. 28 U.S.C. § 1471(c). By vesting ultimate decision-making authority and sole and complete control over the entire litigation and judgment enforcement process in non-Article III bankruptcy judges, the Reform Act violates the limitations on constitutional delegation of Article III power set out last Term in *United States v. Raddatz*, 447 U.S. 667 (1980).

B. Appellants' argument that past practice under the Bankruptcy Act of 1898 represents a valid exception to the constitutional guidelines established by *Raddatz* relies upon a misapprehension of the radical changes in the power and jurisdiction of bankruptcy courts effected by the Reform Act. Prior to 1973, district courts' control over bankruptcy proceedings essentially comported with the requirements of constitutional delegation set out in *Raddatz*, including control of reference and *de novo* determination. Even under the 1973

Bankruptcy Rules, district courts controlled proceedings before referees by means of their power to withdraw cases at any time and thus, although no court so held, the delegation to referees arguably met the *Raddatz* requirements. Appellants' second argument that the former Bankruptcy Act vested jurisdiction over plenary suits in bankruptcy referees upon a defendant's consent is also mistaken. Jurisdiction over plenary suits was always vested in an Article III district court. *McDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932); *Williams v. Austrian*, 331 U.S. 642 (1947); *Schumacher v. Beeler*, 293 U.S. 367 (1934). Furthermore, at no time under the former Bankruptcy Act could a referee conduct a jury trial in a matter like the present case, where the defendant has a constitutional right to a trial of a common law claim.

C. Appellants' argument that the existence of ultimate review by an Article III judge satisfies Article III is directly contradicted by the explicit requirement of Article III that "Judges, *both* of the supreme and inferior courts" shall enjoy life tenure and undiminished compensation. As recognized by James Madison, appellate review of errors of law does not alleviate the dangers of having a "dependent judge." 1 *Records of the Federal Convention* 124 (M.Farrand ed. 1911). Appellants' argument that Article III applies only to appellate courts proves too much in that it would lead to the absurd result that Congress could create non-Article III trial courts in place of the present federal district courts.

III.

A. The legislative history of the Reform Act reveals that after the Department of Justice and the House took the position that Article I bankruptcy courts would be unconstitutional, the Senate rejected a suggestion to establish "a separate Article I court" and instead

adopted the "adjunct" approach discussed above. Congress could not have created Article I bankruptcy courts consistent with the Constitution since legislative courts can validly be and have only been created where they do not transgress Article III's underlying principles of federalism and separation of powers.

B. Legislative courts with general jurisdiction may operate without violating the federalist and tripartite structure of the national government only in those geographical areas outside of the states in which the federal government exercises the sovereign power of a state. *American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828). Both the territories and the District of Columbia are specialized areas where Congress is not bound by federalist constraints in creating local courts to hear local matters. *Palmore v. United States*, 411 U.S. 389 (1973). However, this Court has recognized that even in the District of Columbia only Article III courts may exercise jurisdiction "where laws of national applicability and matters of national concern are at stake." *Id.* at 408; *O'Donoghue v. United States*, 289 U.S. 516 (1933).

C. Although most specialized federal courts within the states are Article III courts, there are two subject matter legislative courts within the states, the Court of Military Appeals and the Tax Court. These courts do not violate the principle of separation of powers because they exercise limited judicial powers and exercise jurisdiction solely over those matters arising between the government and others which involve the federal sovereign power to conduct war and collect taxes, *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971), *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858). Far from supporting the bankruptcy court's exercise of nationwide personal jurisdiction and almost limitless subject matter jurisdiction over common law and state and federal statutory disputes, decisions of this Court repeatedly have held unconstitutional any exercise of

expanded jurisdiction by subject matter legislative courts that encroaches upon the jurisdiction of Article III courts. *O'Callahan v. Parker*, 395 U.S. 258 (1969), *United States ex.rel. Toth v. Quarles*, 350 U.S. 11 (1955). Congress cannot, in enacting uniform legislation, withdraw from the Article III courts and delegate to the legislative or executive departments suits at common law, or in equity or admiralty. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

In addition, no extraordinary need exists to justify the transfer of non-bankruptcy lawsuits to a legislative bankruptcy court, even if such a transfer were possible. No practical advantage is gained by trying antitrust or state property lawsuits before specialized bankruptcy judges. Not only does the creation of specialist trial and appellate courts run counter to the modern trend in judicial administration, but violation of the principles of federalism and comity caused by removal of non-bankruptcy common law cases from the state courts to federal legislative tribunals cannot be justified on the ground of efficiency.

D. Congress did not create the bankruptcy courts as an administrative agency. Furthermore, even if Congress had chosen such an alternative, no administrative agency has ever been empowered to exercise the full judicial powers or broad subject matter jurisdiction over state law claims granted to the bankruptcy courts. "Wholly private tort [and] contract . . . cases," like the present case, may not be delegated to administative agencies. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 458 (1977).

ARGUMENT

I. ARTICLE III OF THE CONSTITUTION REQUIRES THAT A LAWSUIT BROUGHT BY A BANKRUPTCY TRUSTEE AGAINST A NON-PARTICIPANT IN THE BANKRUPTCY PROCEEDING IN AN INFERIOR FEDERAL COURT BE HEARD BEFORE A JUDGE WITH LIFE TENURE AND UNDIMINISHABLE SALARY.

The Reform Act represents the first attempt by Congress in the history of the nation to establish in each state an independent federal court with judges who do not enjoy the Article III guarantees of life tenure and undiminished salary and who are vested with the power to conduct jury trials and enter and enforce final judgments in disputes between private parties based upon common law as well as statutory and constitutional claims. The district court below correctly concluded that the vesting of such broad jurisdiction in a non-Article III judge contravenes Article III, section 1 of the United States Constitution which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

Appointment "during good Behavior" has been read uniformly to require life tenure for judges of the inferior federal courts. *See, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); *Shurtleff v. U.S.*, 189 U.S. 311, 316 (1903); P. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U.Chi. L.Rev. 665, 669 (1969). Article III requires that the compensation of federal judges be not

just statutorily guaranteed, but that it be beyond the purview of Congress to diminish. *Glidden v. Zdanok*, 370 U.S. 530, 534 (1962) (Harlan, J., concurring). As judicial officers of the United States, judges of the inferior courts appointed "during good Behavior" may be removed from office solely upon impeachment for a conviction of treason, bribery or other high crimes and misdemeanors. U.S. Const. art. II, §4; *see, e.g., Toth*, 350 U.S. at 16; *Shurtleff*, 189 U.S. at 316; Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979). Bankruptcy judges, both during the transition period and after April 1, 1984, are denied all of the protections mandated by Article III. They serve periodic terms and are dependent for reappointment upon the President and the Senate. Their compensation may be reviewed and diminished by Congress, and they may be removed from office for less than impeachable offenses.

Although Article III does not require Congress to create any inferior federal court at all, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (opinion of Harlan, J.), or to vest all of the jurisdiction to which the judicial power of the United States extends in those inferior courts it does create, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850), Article III does require that when Congress creates an inferior court to exercise "the judicial power of the United States," all judges of such a court be appointed to serve "during good Behavior" with an undiminishable salary. Although appellants argue that these mandatory requirements of Article III may be disregarded whenever Congress finds a particular "need" to disregard Article III, neither the language of the Constitution nor cases interpreting Article III support such an argument. Just last Term in *United States v. Will*, 449 U.S. 200 (1980), this Court, in holding that Congress is forbidden by the Compensation Clause to repeal judicial salary increases after they have taken

effect, re-emphasized the fundamental and inviolable nature of Article III's guarantees which form the cornerstone of the independence of the judicial branch of the federal government:

> The Compensation Clause has its roots in the long-standing Anglo-American tradition of an independent judiciary. A judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

Id. at 217-218. *See also, Evans v. Gore*, 253 U.S. 245, 248-53 (1920).

No evidence exists that the Constitution's authors intended Article III to allow Congress to create in the states some inferior federal courts which do not comport with the tenure and salary provisions of that Article. *See, e.g.*, Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 Col.L.Rev. 133, 149 (1962). As Justice Frankfurter has noted, "there was a deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949). In drafting the Constitution, the Framers sought to protect against an overbearing national government, not by employing the technique adopted in the Bill of Rights of preventing governmental intrusions into defined areas of individual conduct, but by first limiting the federal government's power and then dividing the remaining power among three autonomous branches. The Framers thus intended the limitations of Article III to serve the concepts of both federalism and separation of powers:

> [There are] two entirely different principles embodied in Article 3 as elsewhere in the Constitution, but of which were repeatedly adverted to in

> the Constitutional Convention and have since been followed by this Court without substantial deviation.
>
> The first of these principles is that the three branches of government established by the Constitution are of coordinate rank and that none may encroach upon the powers and functions entrusted to the others by that instrument ... Of equal importance, however, was the second principle, that the "Constitution contains a grant of power by the states to the federal government, and that all powers not specifically granted were reserved to the states or to the people."

Tidewater, supra, at 628 (Rutledge, J., concurring). *See* T. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L. J. 297, 301-303 (1981) (hereinafter "Krattenmaker").

In creating a federal government of limited powers, the states were particularly reluctant to permit state courts to be displaced by inferior federal tribunals. At the Convention, there were many "who thought that no inferior federal tribunals should be authorized; that state courts should be entrusted with the decision of all federal questions, subject to appeal to one Supreme Court." *Tidewater, supra*, at 632. Indeed, John Rutledge's motion to strike out "inferior tribunals" from the Judiciary Article carried five states to four with two divided. After the motion carried, Madison suggested a compromise by which the Legislature would be given the discretion to establish inferior tribunals. 1 *The Records of the Federal Convention* 124-125 (M. Farrand ed. 1911) (hereinafter "Farrand"). Even though this proposal encountered strong opposition,[2]

[2] Pierce Butler stated that "[t]he people will not bear such innovations. The states will revolt at such encroachments." 1 Farrand, supra ,

Madison's compromise was adopted. *Id.* As a result of this compromise, Congress was given power to create inferior federal tribunals which would exercise judicial power in the states subject to two limitations: the tenure and salary requirements of Article III, §1, and the subject matter limitations of Article III, §2.

Article III was intended not only to circumscribe the exercise of federal judicial power in the states, but also to prevent "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands..." *The Federalist*, No. 47 (J. Madison) 324 (J. Cooke ed. 1961). As noted by this Court in *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933),

> [t]he anxiety of the framers of the Constitution to preserve the independence especially of the judicial department...was foreshadowed, and its vital character attested, by the Declaration of Independence, which, among the injuries and usurpations recited against the King of the Great Britain, declared that he had "made judges dependent on his will alone, for the tenure of their offices, and the amount in payment of their salaries."

Alexander Hamilton in *The Federalist*, Nos. 78 and 79, emphasized the importance of the tenure and salary guarantees in achieving the Framers' objective of preserving the independence of the judicial branch:

> The standard of good behavior for the continuance in office of the Judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: In a republic, it is a no less excellent barrier to the

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125. See also 2 Farrand, *supra*, 45-46; 3 Farrand, *supra*, 156-57 (argument of Luther Martin before Maryland House of Representatives opposing ratification of the Constitution).

> encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws. . . . Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. [No. 78, *supra*, at 522, 529].
>
> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter. [No. 79, *supra*, at 531]

The tenure and salary provisions were intended to serve important structural values in the Constitution. "They disperse power, preserve the appearance of fairness, protect the independence and integrity of federal judges, and eliminate the need for case-by-case supervision of a judge's independence under the rubric of due process." *Krattenmaker*, *supra*, at 306. These provisions are the answer the United States has adopted by means of a written constitution, on the basis of the Framers' historical experience, to the question of how far judges and legislators should be separated. *Id.* at 311. The Reform Act's disregard of Article III's requirements seriously impairs the vitality of the Constitution's division of powers, regardless of whether fairness to individual litigants is maintained.

The tenure and salary guarantees of Section 1 of Article III apply to all inferior courts that exercise "the judicial power of the United States." Article III, Section

2 provides that "the judicial Power shall extend to all Cases in Law and Equity, arising under. . . the Laws of the United States. . . " Because the present suit is a case arising under federal law, the bankruptcy court below was called upon to exercise the "judicial power of the United States." The jurisdiction to adjudicate claims by trustees against non-participants in the bankruptcy proceedings has been exercised by the federal district and circuit courts for over a century. Bankruptcy Act of 1841, Act of August 16, 1841, c.9, §§6, 8, 5 Stat. 440, 446; Bankruptcy Act of 1867, Act of March 2, 1867, c.176, §§1, 2, 14 Stat. 517, 518; Bankruptcy Act of 1898, Act of July 1, 1898 (hereinafter "1898 Act") c.541, §§2, 23, 30 Stat. 544, 545, 552 (former 11 U.S.C. §46(b)). The exercise of jurisdiction by Article III federal courts over such suits is a form of federal question jurisdiction. *See Mitchell v. Great Works Milling and Manufacturing Co.*, 17 F.Cas. 446, 449 (C.C.D.Me. 1843) (Story, J.); *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 611-612, 652 n.3, (1949) (Rutledge and Murphy, J.J., concurring; Frankfurter, Reed, Vinson and Douglas, J.J., dissenting); Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 194-95, (1953). Indeed, Justice Rutledge, concurring in *Tidewater, supra*, expressly held that the exercise of jurisdiction over plenary suits by trustees upon the consent of the defendant constituted "a segment of the district court's federal-question jurisdiction." *Id.* at 612.

Article III therefore requires that, if Northern's claim is to be adjudicated by a federal court, the judge of the inferior court must enjoy Article III's tenure and compensation guarantees. The Reform Act's denial to Marathon of a proceeding before an Article III judge is a deprivation of "basic constitutional protections designed in part for the benefit of litigants." *Glidden, supra*, at 536. *See, O'Donoghue v. United States, supra*, at 533.

Appellants have argued that the constitutionality of the exercise of expanded jurisdiction by the non-Article III court may be sustained either on the ground that the bankruptcy courts do in fact meet Article III's tenure and compensation requirements, or that the bankruptcy courts are removed from the requirements of Article III because they constitute legislative or Article I courts. The logical application of appellants' arguments leads to the conclusion that Article III places no express limitations whatsoever on Congressional power to establish federal courts in the states. Short of adoption of the appellants' underlying premise that Article III be deleted from the Constitution and relegated to the historical waste basket, the Reform Act's provisions for exercise of expanded jurisdiction by non-Article III judges cannot be upheld. As discussed below, non-Article III bankruptcy courts in exercising jurisdiction over non-bankruptcy common law suits between private parties cannot be sustained either as satisfying the requirements of Article III or as constituting legislative courts when such assertions are analyzed in light of the "definiteness and precision of phrasing" of Article III, *Tidewater, supra*, at 654 (Frankfurter, J., dissenting), and Article III's informing principles of federalism and separation of powers. *See United States v. One 1974 Rockwell Aerocommander*, No. CA4-80-289E (N.D.Tex. Jan. 11, 1982); Krattenmaker, *supra;* Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures*, 88 Harv.L.Rev. 1360, 1458-69 (1975) (hereinafter "Plumb"); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 Col.L.Rev. 560 (1980) (hereinafter "Columbia Note").

II. MARATHON'S CONSTITUTIONAL RIGHT TO AN ARTICLE III JUDGE IS NOT SATISFIED BY STYLING THE FULLY INDEPENDENT BANKRUPTCY COURT AN "ADJUNCT", NOR BY PROVISION OF ULTIMATE APPELLATE REVIEW BY AN ARTICLE III JUDGE

Appellants' argument that the bankruptcy courts may be sustained as meeting the requirements of Article III is essentially threefold: (1) that the cases over which the bankruptcy courts exercise jurisdiction are under the "total control" of the district court as required by *United States v. Raddatz*, 447 U.S. 667 (1980), because the courts are styled "adjuncts" to the district courts; (2) that the Reform Act is not a significant change from the jurisdiction or powers exercised by referees under the Bankruptcy Act and thus, that even if the requirements of *Raddatz* are not met, they have not been met for eighty years; and (3) Article III is satisfied if at some point a litigant is afforded limited appellate review by an Article III judge.

A. Article III is not satisfied by the "adjunct" label, absent any control or decisional authority in the district courts.

Appellants' argument that the styling of the bankruptcy courts as "adjunct[s]" to the district courts satisfies Article III does not withstand an analysis of the actual powers and jurisdiction conferred upon the newly created independent courts of record. The designation as "adjunct" is not implemented by any other provisions in the Reform Act. 28 U.S.C. §1471(b) initially deposits jurisdiction over civil proceedings related to cases under Title 11 in the district courts, but then "all of the jurisdiction conferred by this section on the district courts" is immediately removed from the district courts and redeposited in the bankruptcy courts. 28 U.S.C. §1471(c). While the Senate Report urges that through this procedure the district courts act

as "article III repositories", S.Rep. No. 95-939, 95th Cong., 2d Sess. 16 (1978) (hereinafter "Senate Report), the language of 28 U.S.C. §1471 can at best be read to provide for a metaphysical rather than temporal vesting of the jurisdiction in the district courts. "It is quite doubtful that this bit of legerdemain will overcome any extant constitutional prohibitions." 1 *Collier on Bankruptcy* §2.01, p. 2-29 (15th ed. 1980); *Marathon*, J.S.App. at 5a n.4. Indeed, the legislative history of this provision indicates that Congress actually sought to create a "functionally independent bankruptcy court." Senate Report, *supra*, at 15, 17; House Report, *supra*, at 2.

Whatever the import of the term "adjunct", it is clear that the delegation of ultimate decisional control to a non-Article III judge transgresses the limits on delegation of powers by Article III courts clearly delineated by this Court last Term in *United States v. Raddatz*, 447 U.S. 667 (1980). The majority in *Raddatz* held that a limited delegation for the purpose of allowing a magistrate to hear a pretrial suppression motion did not violate Article III because the entire process was under the "total control" of and the ultimate decision was made by the district court judge.[3] *Id.* at 682. In contrast to the present case, the Court in *Raddatz*

> [did] not face a procedure under which 'Congress [has] delegate[d] to a non-Art III judge the authority to make final determinations on issues of fact.'

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[3] The reference of the pretrial motion to a magistrate was in the sole discretion of the district court judge. *Raddatz*, 447 U.S. at 673. The defendant retained the right to trial before an Article III judge, together with the right to renew his suppression motion at trial. *Id.* at 678 n.6. Upon submission of "proposed findings of fact and recommendations", 28 U.S.C. §636(b), the district court judge was required to conduct a "de novo determination" in which the judge could "freely reject the magistrate's recommendation ... hear the evidence in whole or part... call for additional findings or otherwise recommit the matter to the magistrate with instructions." *Raddatz, supra*, at 685 (Blackmun, J., concurring).

> Post, at 703, 65 L.Ed.2d, at 451 (dissenting opinion). Rather, we confront a procedure under which Congress has vested in Art III judges the discretionary power to delegate certain functions to competent and impartial assistants, *while ensuring that the judges retain complete supervisory control over the assistant's activities.*

Id. at 686 (Blackmun, J., concurring) (emphasis added).

The Reform Act's creation of an independent court empowered to conduct jury trials and enter and enforce final judgments cannot be sustained as a permissible delegation to an assistant within the district court. A "delegation does not violate Art III *so long as* the ultimate decision is made by the district court." *Id.* at 683 (emphasis added). *See Mathews v. Weber*, 423 U.S. 261, 269-71 (1976); *Wingo v. Wedding*, 418 U.S. 461, 478 n.4, 484-86 (1974) (Burger, C. J., dissenting). Under the Reform Act, however, not only is the ultimate decision made by the bankruptcy judge, but the entire process of filing, service, discovery, trial and entry and enforcement of judgement is under the bankruptcy courts' sole and complete control. As such, the exercise of expanded jurisdiction by the bankruptcy courts does not even involve the question of permissible delegation of duties by the district courts because the district courts, as a practical matter, do not possess any jurisdiction and do not exercise any control over these plenary cases. The "delegation" is not made by the federal district courts, but by Congress. United States bankruptcy judges are not "assistants" to district court judges, but rather are judges of "functionally independent courts."[4]

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[4] Unlike masters, magistrates and other assistants, bankruptcy judges are "judges of the United States," 28 U.S.C. §451, and may be members of the Judicial Conference of the United States and the judicial conferences of the circuits, 28 U.S.C. §§331, 333. *See also* 28 U.S.C. §§293, 294, 295, 456, 771, and 772. Similarly, each bankruptcy court is declared a "court of the United States," 28 U.S.C. §451, and a "court of record," 28 U.S.C. §151.

B. The Reform Act made constitutionally significant changes from practice under the former Bankruptcy Act.

Appellants also argue that even if the absence of any district court control over the bankruptcy judge is unconstitutional under the guidelines established by *Raddatz*, these constitutional limitations do not apply in the bankruptcy context because the powers and jurisdiction purportedly conferred on the bankruptcy judges by the Reform Act are nearly identical to the powers and jurisdiction of the referees under the Bankruptcy Act of 1898. The proposition, dubious even if it had been factually accurate, fails because it relies on a misapprehension of the radical change in the structure and powers of the bankruptcy courts effected by the Reform Act. The Reform Act did much more than slightly alter the role of the bankruptcy referee, as suggested by appellants. Rather, it abolished the office of bankruptcy referee, established new courts of record completely independent of the control of the district courts, and vested the new courts with powers and jurisdiction nearly co-extensive with those of the district courts. *See* 1 *Collier on Bankruptcy* §§1.02(2), 1.03(1) (15th ed. 1980).

Although the role of the referee in bankruptcy has undergone a gradual development and expansion of powers since its creation in 1898, *see* House Report, *supra*, at 8-9, it was not until the Reform Act that all form of control over bankruptcy and bankruptcy-related proceedings was removed from the district court. Prior to the promulgation of the Bankruptcy Rules in 1973, bankruptcy referees acted as assistants to the district court, much as did the magistrates discussed in *Raddatz*. The Bankruptcy Act of 1898 did not provide for reference of cases to referees without an order of the district court judge. 1898 Act, *supra*, §22, 30 Stat. 552. Under the General Orders in Bankruptcy adopted by the Supreme Court in 1939, 305 U.S. 679

(1939), "reference of the case, if any reference is made, to a referee", G.O. No. 1, remained within the power of the district court judge, who also could "fix by special order" the times and places where the referee shall act. G.O. No. 12(2). In 1959, the Bankruptcy Act was amended to allow reference by the clerk "unless the judge or judges direct otherwise." Act of June 23, 1959, §3, 73 Stat. 109. In addition to exercising complete control over the reference of a case to a referee, the district court could, as it could with respect to the magistrate in *Raddatz*, revise or modify the referee's report and take additional evidence. G.O. No. 47.

While the method by which the district court exercised ultimate control over bankruptcy proceedings was modified when the Bankruptcy Rules were adopted in 1973, control was not abrogated. Rather, the mechanism for the district court's control shifted from the order of reference and power to rehear evidence and revise the referee's report to the power to "withdraw a case in whole or part from a referee" at any time. Bankruptcy Rule 102(b). Thus, even under the 1973 Rules, district courts continued to exercise a form of constant control over proceedings before bankruptcy referees.[5] Referees remained assistants to the district court judges subject to their control and review:

> [T]he referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of the reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court.

[5] No court has held that the delegation of decision-making to referees during the six year interim between the promulgation of the Bankruptcy Rules and enactment of the Reform Act sufficiently comported with the requirements of constitutional delegation articulated in *Raddatz*, *supra*.

Weidhorn v. Levy, 253 U.S. 268, 271 (1920); *Matthews v. United Methodist Church (In re Pacific Homes)*, 611 F.2d 1253, 1255 (9th Cir. 1980), quoting *Weidhorn, supra. See also, Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 152-53 (1943).

The Reform Act not only strips the district courts of any control over proceedings before referees, but also grants the new bankruptcy courts jurisdiction over plenary lawsuits between trustees and non-participants in the bankruptcy proceedings, a jurisdiction never before exercised by the courts of bankruptcy, either by the district court sitting as a court of bankruptcy or by a referee, except by consent of the defendant. Prior to the Reform Act, a non-participant sued by the trustee had an absolute right to have the case tried before an Article III judge, if the matter was to proceed in a federal forum. Former 11 U.S.C. §46(b). Where the defendant had a constitutional right to a jury trial (as in the present case), only the district court judge could conduct that trial. Even under the 1973 Bankruptcy Rules, referees could not have conducted a jury trial in the present case,[6] and could only have determined the matter in a summary proceeding if Marathon had consented to the jurisdiction of the court of bankruptcy. *See, Phelps v. United States*, 421 U.S. 330 (1975); *Cline v. Kaplan*, 323 U.S. 97 (1944); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 433-34 (1924); *Weidhorn, supra*; *Matthews v. United Methodist Church, supra*; *Hollywood National Bank v. Bumb*, 409 F.2d 23, 24 (9th Cir. 1969).

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[6] The 1973 Bankruptcy Rules strictly limited referees' conduct of jury trials to statutorily created causes of action — involuntary bankruptcy petitions and petitions to discharge debts — where defendants waived their statutorily created right to a jury trial before the district court. *See* Bankruptcy Rules 115(b)(1) and 409(c).

Appellants argue that Article III is no bar "to vesting jurisdiction of plenary suits in a bankruptcy referee or a legislative adjunct court", Gov. Brief at 45, because an involuntary defendant could consent to a summary proceeding before a referee. Appellants' argument on this point is confused and is based upon a misreading of *Schumacher v. Beeler*, 293 U.S. 367 (1934), *Williams v. Austrian*, 331 U.S. 642 (1947), and *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932). These cases do not even mention Article III because in all three cases jurisdiction over the plenary suits was vested in Article III district courts. In *Schumacher*, *supra*, and *Austrian*, *supra*, jurisdiction was vested in the district court and the matters proceeded before an Article III judge. Similarly, in *MacDonald*, "jurisdiction over the ... suit was ... vested in the District Court as a court of bankruptcy." 286 U.S. at 266. The issue in *MacDonald* was not whether subject matter jurisdiction was vested in a bankruptcy referee by consent, but whether, after jurisdiction was vested in a district court as a court of bankruptcy, the matter could properly be delegated to the referee appointed by the district court as a matter of procedure. *Id.* at 266-68.[7] Such a delegation from the district court to the referee did not violate Article III because, as discussed above,

[7] It should be noted that *MacDonald*, while technically a "plenary" proceeding, involved a voidable preference and thus involved property belonging to the debtor's estate. The distinction between voidable preferences under Section 60 of the former Bankruptcy Act and lawsuits to collect disputed damages by trustees against nonparticipants to the bankruptcy proceedings was codified by Section 23(b) of the former Bankruptcy Act. Former 11 U.S.C. §46(b). The case is thus dissimilar from the instant plenary proceeding brought to augment the estate rather than simply to collect existing assets. *See* Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv.L.Rev. 703 (1982). An action to recover disputed contract or tort damages is not an action to recover anything, because no "res," "fund" or "property" of the bankrupt exists. *See Hollywood National Bank*, *supra*, 409 F.2d at 24; *Tamasha Town and Country Club v. McAlester Construction Finance Co.*, 252 F.Supp. 80, 86 (S.D. Cal. 1966).

at the time of the decision in *MacDonald* in 1932, all matters referred to a referee remained under the total control of the Article III district court judge. Once subject matter is vested in the federal district court, the parties may, with approval of the court, consent to variations in the method of processing their litigation, including referral of the case for hearing to a non-Article III assistant. *See Hecker v. Fowler*, 69 U.S. (2 Wall.) 123 (1865); *Kimberly v. Arms*, 129 U.S. 512, 523-25 (1889); *DeCosta v. Columbia Broadcasting System*, 520 F.2d 499, 502-09 (lst Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

Since federal jurisdiction over a trustee's suit to enforce a contract claim was always vested in an Article III court exercising total control over the matter, prior practice under the Bankruptcy Act does not support the existence of an exception to the constitutional limits on delegation of judicial powers established by *Raddatz*, *supra*.

C. Article III applies equally to inferior federal trial and appellate courts.

Finally, appellants contend that the tenure and salary provisions of Article III apply only to appellate judges. This proposition is directly contradicted by the explicit requirement of Article III that "Judges, *both* of the supreme *and inferior Courts*, *shall* hold their Offices during good Behavior, and *shall*" receive an undiminished compensation. *See*, Krattenmaker, *supra*, at 307; Subcommittee Report, *supra*, at 65 (letter from Professor Sandalow). In encompassing all inferior federal court judges within the tenure and salary requirements of Article III, the Framers were fully aware that appellate review reaches only errors of law and only those few cases that actually go to trial and are

appealed.[8] "[B]ecause the threats to the separation of powers and judicial integrity envisioned by the Framers of Article III flow largely from control of judges' subsistence and tenure, rather than from direct manipulation of the law, appellate review is an inadequate corrective." *Columbia Note*, *supra*, at 592. *See also*, *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970) ("There can be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or *in any phase* of the *decisional function*." *Id.* at 84 (emphasis added)).

None of the cases cited by the Government support its suggestion that "at least in civil cases, Article III is satisfied if appellate review by an Article III tribunal is available." Gov. Brief at 41.[9] As discussed above, *Raddatz* held that delegation from a district court judge to a magistrate satisfied Article III requirements only where "the entire process takes place under the district court's

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[8] As discussed on pages 15-17 *supra*, the Federal Convention ultimately rejected Rutledge's proposal that there be no inferior tribunals and that all cases should be decided in the first instance by state tribunals with "the right of appeal to the supreme national tribunal." Madison, whose compromise solution was finally adopted, expressly stated that the extension of Article III guarantees solely to an appellate court was insufficient:

> "Mr. [Madison] observed that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that besides, *an appeal would not in many cases be a remedy*. What was to be done after improper Verdicts in State tribunals obtained under the biassed direction *of a dependent Judge . . .* ? *To remand the cause for a new trial would answer no purpose*. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court." 1 Farrand, *supra*, at 124 (emphasis added).

[9] Under the Reform Act, appeals will be taken from a non-Article III bankruptcy judge to a non-Article III three-judge panel where established. 28 U.S.C. §160. A second appeal from the panel to the circuit court of appeals would have to be taken to obtain Article III review. 28 U.S.C. §1293(a).

total control and jurisdiction," including control of reference and *de novo* review. *Raddatz*, 447 U.S. at 681. Given the almost co-extensive powers of the bankruptcy courts and district courts, the government's reading of Article III would require the absurd conclusion that Congress could create non-Article III United States district courts if their jurisdiction were limited "at least to civil cases," since the district courts would act simply as "primary fact finders ... leav[ing] the determination of the law in the hands of Article III judges," of the courts of appeal. Gov. Brief at 40.

The government's interpretation of Article III was impliedly rejected by this Court in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), which involved two cases. In one, a judge of the Court of Claims sat on a court of appeals panel. In the other, a federal district court trial was presided over by a judge of the Court of Customs and Patent Appeals and his decision was reviewed by a Court of Appeals composed solely of regular Court of Appeals judges. Justice Harlan's conclusion that the question of whether the Court of Customs and Patent Appeals was an Article I or Article III court could not be avoided, 370 U.S. at 534, clearly indicates that this Court did not consider that Article III was satisfied by the availability of appellate review by an Article III judge.

Thus, the mere labeling of the functionally independent bankruptcy courts as "adjuncts" does not satisfy the minimum requirements for constitutionally permissible delegation established by this Court in *Raddatz*. Nor does the existence of second or third tier appellate review by an Article III judge satisfy Article III's requirement that every judge of inferior federal courts enjoy life tenure and undiminished compensation. Congress' attempt to sidestep the constitutional infirmity in the Reform Act's grant of full judicial power and expanded jurisdiction to non-Article III judges by

means of semantic wordplay constitutes a dangerous inroad on the institutional protection that Article III courts were intended to provide.

III. IN EXERCISING FULL JUDICIAL POWERS AND NATIONWIDE JURISDICTION OVER LAWSUITS BETWEEN PRIVATE PARTIES WITHIN EACH STATE, A BANKRUPTCY COURT DOES NOT ACT AS A MERE LEGISLATIVE COURT OR ADMINISTRATIVE AGENCY.

A. Congress itself rejected the concept of Article I bankruptcy courts as unconstitutional.

Appellants finally argue that even if styling the independent bankruptcy courts "adjuncts" to the district courts does not satisfy the requirements of Article III, the new bankruptcy courts may be sustained on the ground that they are legislative courts or an administrative agency. Appellants' argument is ill-founded. The Reform Act and its legislative history indicate that Congress chose not to create bankruptcy courts as Article I courts based on the Department of Justice's and the House Committee on the Judiciary's conclusion that Article I bankruptcy courts would be unconstitutional. Justice Dep't Letter, *supra*; Hearings on S.2266 and H.R.8200 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 544, 548-49 (1977) (testimony of Attorney-General Griffin Bell); House Report, *supra*, at 7-52. Contrary to its procedure in creating the United States Court of Military Appeals, 10 U.S.C. §867, the United States Tax Court, 26 U.S.C. §7441, and the two local District of Columbia courts, 11 D.C. Code §11-101(2), Congress did not specify that the bankruptcy courts were "established under article I of the Constitution". This omission and the inclusion of the bankruptcy courts within Title 28 of the United States Code reflects Congress' decision to reject the suggestion of establishing "a separate article I court patterned

after the United States Tax Court", and, instead, to establish the new bankruptcy courts as "adjunct[s] of the United States District Court." Senate Report, *supra*, at 16.[10]

Congress' conclusion that the bankruptcy courts could not constitutionally be created outside of Article III is supported by a review of the limited "legislative court" doctrine. As pointed out by Justice Harlan in *Glidden v. Zdanok*, 370 U.S. 530, 543, (1962),

> [t]he Constitution nowhere makes reference to "legislative courts." The power given Congress in Art 1, §8, cl 9, "to constitute Tribunals inferior to the supreme Court" plainly relates to the "inferior Courts" provided for in Art 3, §1; it has never been relied on for establishment of any other tribunals.

This Court has upheld the establishment of federal tribunals outside the norm of Article III only in two extremely limited situations. First, outside of the states in geographical enclaves where the federal government exercises the full sovereign powers of a state government, non-Article III federal courts have been established which exercise full judicial powers and broad jurisdiction similar to bankruptcy courts. *Palmore v. United States*, 411 U.S. 389 (1973); *American Insurance Co. v. 356 Bales of Cotton* (Canter), 26 U.S. (1 Pet.) 511 (1828). Second, inside the states, legislative courts have been established which exercise limited judicial powers and jurisdication confined solely to those disputes between the government and others which are capable of purely executive or legislative

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[10] Congress did not create "Article I adjuncts," Gov. Brief at 37, 38, but rather chose the "adjunct" court approach instead of creating Article I legislative courts. It should be noted that the Senate's attempt to resolve the constitutional difficulties by creating the bankruptcy courts as adjuncts to the Article III district courts was made without the benefit of this Court's decision in *United States v Raddatz*, *supra*, which clarified the constitutional limitations on the delegation of power from the district courts to non-article III assistants.

determination. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971).

The Department of Justice recognized these narrow limitations on the doctrine of legislative courts when it took the position before the House Committee on the Judiciary during consideration of the bankruptcy reform legislation that establishment of Article I bankruptcy courts would be unconstitutional. *See* Justice Dep't. Letter, *supra*, App. A at 4a-7a. Now, however, the Government suggests that there is "no constitutional principle that warrants singling out these two situations from others in which Congress also has plenary authority to legislate." Gov. Brief at 19. Quite to the contrary, the limitation of legislative courts to these two situations is mandated by the constitutional principles of federalism and separation of powers that underlie Article III's salary and tenure requirements, *Tidewater*, *supra*, at 628 (Rutledge, J., concurring), and that are violated by the bankruptcy courts' exercise of expanded jurisdiction.

B. The federal government's exercise of sovereign power in the territories and the District of Columbia does not support the creation of bankruptcy courts within the states having jurisdiction over laws of national applicability and matters of national concern.

The concept of "legislative courts" derives from the opinion of the Chief Justice Marshall in *American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828), in which the Court held that the exercise of judicial power pursuant to Article IV in the territories does not constitute the exercise of that "judicial power of the United States" defined by Article III. *Id.* at 546. Justice Marshall stated that although admiralty jurisdiction could be exercised "in the territories" by legislative courts created by virtue of the federal

government's sovereign power in the territories, admiralty jurisdiction can be exercised *in the states* in those courts *only* which are established pursuant to the 3rd article of the Constitution." *Id.* at 546 (emphasis added). *Canter*, therefore, directly refutes appellants' contention that the theory of territorial legislative courts supports the vesting of admiralty, equity, and common law jurisdiction in non-Article III courts within the states. None of the territorial court cases decided since *Canter* suggest otherwise. In *United States v. Coe*, 155 U.S. 76 (1894), the Court approved an untenured Court of Private Land Claims to the extent that the land claims arose within the Territory of Arizona and not in a state. *Id.* at 84-86. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 267 (1901) ("certainly no such court could be created within a state, except under the restrictions of the judicial clause") (Brown, J. concurring); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (untenured Choctaw and Chickasaw Citizenship Court in Indian Territory); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (unincorporated United States possessions); *In re Ross*, 140 U.S. 453 (1891) (Consular Court established in China for United States citizens).

Likewise in the District of Columbia, "[t]he restraints of federalism are . . . removed from the powers exercisable by Congress. . . ." *Glidden*, 370 U.S., at 581 (Harlan, J. concurring). There is in the District of Columbia, in contrast to the states, "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government. . ." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838). The right of the federal government to exercise its sovereign power over local matters within the District by constituting non-Article III local courts was recently reaffirmed in *Palmore v. United States*, 411 U.S. 389 (1973). Under the District of Columbia Court Reform and Criminal Procedure Act of [July 29,] 1970, 84 Stat. 473, the Court of Appeals and

the District Court for the District of Columbia exercise only federal jurisdiction. The remaining local jurisdiction previously exercised by those courts was transferred to local courts presided over by non-Article III judges. Carefully noting that the District of Columbia residents still had access to Article III courts for normal 'federal' matters, *Id.* at 407, this Court held that the establishment of non-Article III courts to handle "local" matters constituted a permissible exercise of Congress' "police and regulatory powers" within the District. *Id.* at 397. The Court stated that since Congress has all the powers which a "state legislature or municipal government would have in legislating for state or local purposes,... [it] may vest and distribute the judicial authority in and among the courts and magistrates...as it may think fit..." *Id.*, quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).

Based on *Palmore*, appellants argue that since a lawsuit brought by a bankruptcy trustee against a nonparticipant in the bankruptcy proceedings may be heard before a non-Article III state judge, then there is no constitutional infirmity to having the same lawsuit heard before a non-Article III federal judge. This argument ignores the federalist structure of the Constitution. The statement in *Palmore* that citizens of both states and the District of Columbia who have violated local criminal laws are tried in local, non-federal tribunals before judges without tenure and salary guarantees, *Id.* at 410, merely emphasized that the Article III federalist restraints are not operative within the District of Columbia and thus, in the District, the federal government may establish non-tenured tribunals as may any other state. The federal government does not have the same powers in the states. In making the creation of inferior federal courts permissive, the Framers intended to preserve a wider field for state judicial power, not to permit Congress to expand federal judicial

power in the states in a manner inconsistent with Article III. *See* pages 15-17, *supra*. If a non-Article III federal court may try plenary lawsuits because such suits would otherwise be heard in a non-Article III state court, Gov. Brief at 33 n.22, then no constitutional objection exists to the vesting of all general federal question jurisdiction in non-Article III federal courts since, prior to 1875, all such cases were heard before non-Article III state court judges. Act of March 3, 1875, 18 Stat. 470. *See* C. Wright, *Law of Federal Courts* 5 (3d ed. 1976). Appellants' proposed reading of Article III requires acceptance of their premise that Article III and its underlying principles of federalism and separation of powers are "practically meaningless." *Raddatz*, 447 U.S. at 705 n.6 (Marshall, J. dissenting).

Appellants have also suggested that dictum in *Palmore* that Congress may create a non-Article III court in "specialized areas having particularized needs and warranting distinctive treatment" means that constitutional requirements may be disregarded whenever "practical considerations" would make a non-Article III court more economical or efficient.[11] Gov. Brief at 20-23, quoting *Palmore*, 411 U.S. at 404, 408. Appellants misinterpret this language to mean that Congress can dispense with Article III in creating a court for any one of the areas in which Congress can enact uniform national

[11] The reference to "practical considerations" in the *Palmore* opinion was not, contrary to the Government's suggestion, offered as a constitutional principle justifying the establishment of non-Article III courts. The phrase is found in a quotation from *Glidden v. Zdanok*, 370 U.S. at 547, which described the very narrow limits on Congress' power to create Article I courts. Justice Harlan spoke only of those "practical considerations" involved in territorial courts "arising outside the normal context of a federal system." *Id.* at 547. Justice Harlan stated that even in the territories, when practical considerations such as "the particular local setting, the practical necessities, and the possible alternatives" did not require it, the *Canter* holding allowing the creation of Article I courts outside of the states "has not been deemed controlling. *O'Donoghue v. United States* 289 U.S. 516, 536-539." *Glidden*, 370 U.S. at 547-48.

legislation. The holding in *Palmore* is not so broad. *See*, Justice Dep't Letter, *supra*, ("the context in which this phrase appears in *Palmore*...suggests strongly that what the Court intended by the use of 'specialized areas' was specialized geographical areas." App. A at 6a). *Palmore*, like prior cases upholding Article I courts, stands only for the proposition that in specialized areas where the principles of federalism and separation of powers do not constrain congressional action, Congress may establish courts outside of Article III. *See*, Note, *Masters and Magistrates*, 88 Harv. L. Rev. 779, 781-787 and n.55 (1975). In establishing local courts for the District of Columbia, Congress clearly acted within a special area where it is not bound by federalist constraints. *Palmore* emphasized, however, that the "requirements of Art. III...are applicable where laws of national applicability," like the bankruptcy, securities, antitrust and other federal statutory laws applied by the new bankruptcy courts, and where "affairs of national concern," like the large corporate reorganizations, "are at stake." *Id.* at 408. *See*, *O'Donoghue v. United States*, 289 U.S. 516 (1933) (courts handling general federal matters in District must be Article III courts); H.Rep. No. 135, 89th Cong., 1st Sess. 2 (1965); S.Rep. No. 1504, 89th Cong., 2nd Sess. 2 (1966) (federal litigants in Puerto Rico are entitled to Article III judges).

Neither *Palmore* nor any of this Court's prior decisions involving Congress' creation of courts pursuant to its sovereign power in the territories and in the District of Columbia support the establishment of non-Article III bankruptcy courts exercising full judicial powers and broad jurisdiction over "laws of national applicability" within each of the states.[12]

[12] The bankruptcy court in *Segara v. Banco Central Economias*, 14 Bankr. 870 (Bankr. D.P.R. 1981), which upheld the constitutionality of the

C. Unlike the exercise of limited judicial powers and jurisdiction by legislative courts within the states, the bankruptcy courts' exercise of full judicial powers over common law causes of action violates Article III's principles of federalism and separation of powers.

1. Federal legislative courts within the states have a far more tenuous foothold than legislative courts outside the states. Congress has explicitly created only two such courts, the Court of Military Appeals and the Tax Court.[13] This Court has recognized the right of Congress to establish legislative courts within the states only when such courts exercise limited powers and adjudicate matters arising between the Government and others. *Dynes v. Hoover*, 61 U.S.(20 How.) 65 (1858); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929); *Williams v. United States*, 289 U.S. 553, 581 (1933). These decisions hold that since the federal legislative or executive departments have the power to act on certain subject matter involving federal sovereign power without any tribunal, the establishment of an adjudicative tribunal within those departments does not infringe upon the principles of federalism and separation of powers. A

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bankruptcy courts' expanded jurisdiction, based its holding on Congress' authority "to authorize nontenured territorial judges and nontenured state judges to . . . determine federally created rights." *Id.* at 344.

[13] Except for the Tax Court and military courts, all other federal courts within the states, all of which have jurisdiction far more limited than the bankruptcy courts, are constituted as Article III courts: United States Court of International Trade, 28 U.S.C. §251 (formerly United States Customs Court); the United States Court of Customs and Patents Appeals, 28 U.S.C. §211; the United States Court of Claims, 28 U.S.C. §171; Emergency Court of Appeals, Act of Jan. 30, 1942, c.26, §204(e), 56 Stat. 23, 32 (former 52 U.S.C.App. §924) (terminated April 18, 1962); Temporary Emergency Court of Appeals Act of December 22, 1971, 85 Stat. 743; and the Special Court, Regional Rail Reorganizational Act of 1973, 45 U.S.C. § 419. *See also* Act of June 18, 1910, c.309, 36 Stat. 539, 540 (United States Commerce Court).

comparison of the bankruptcy courts with existing Article I subject matter courts demonstrates that no executive or legislative tribunal within the states has ever been endowed with the breadth of judicial powers and jurisdiction granted to the bankruptcy courts.

The subject matter jurisdiction of the bankruptcy courts is not confined to the application of the bankruptcy law. "Examples of the reach of the jurisdiction of the new bankruptcy court could be multiplied *ad infinitum*. Conceptually, there is no limit to the reach of this jurisdiction...." 1 *Collier on Bankruptcy*, §3.01, p.49 (15th ed. 1980). Under their "related to" jurisdiction, 28 U.S.C. §1471(c), bankruptcy courts may entertain lawsuits requiring the application of the entire range of laws of national applicability, including securities, antitrust, labor law, banking, and civil rights suits.[14] Bankruptcy courts may also take jurisdiction over a range of claims by trustees that are traditionally matters of state law, including contract and tort claims as in the present case.[15] Bankruptcy courts may even render affirmative money judgments against a state on contract and tort claims, and enjoin state and municipal

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[14] *See, e.g., Total Communications Corp. v. Executone, et al.*, Adv. Proceeding No. 81-0423-VM (Bankr. D. Ariz.) (Clayton and Sherman Act claims as well as breach of franchise agreement, conversion and tort claims); *In re Unit Parts Co.*, 10 Bankr. 970 (Bankr. W.D. Okla. 1981) (labor law claims); *Maya v. Philadelphia Gas Works*, 8 Bankr. 202, 206-07 (Bankr. E.D.Pa. 1981) (civil rights claims); *Wright v. Credithrift of America*, 11 Bankr. 590 (Bankr. S.D. Miss. 1981) (Truth-in-Lending claims).

[15] *See, e.g., Watt v. State Farm Fire & Casualty Co., 8* BCD *266* (Bankr. W.D.Pa. 1981) (state insurance contract law claims), *Trim Cut Co. v. Beasley*, 4 Bankr. 243 (Bankr. D. Del. 1980) (violations of state corporate law); *Emerald City Records, Inc. v. First Media Corp.*, 9 Bankr. 319 (Bankr. N.D.Ga. 1981) (abuse of civil process). A bankruptcy court may also exercise a non-reviewable right to remove a case from any state or federal court in the country to the bankruptcy court, 28 U.S.C. §1478 — even a non-diverse state action to which the bankrupt is not even a party. *See, e.g., In Re Brothers Coal Co.*, 6 Bankr. 567 (Bankr. W.D.Va. 1980).

bodies, in derogation of the independence of the sovereign states and their agencies. *See generally* Plumb, *supra*, at 1470-74.

In addition to their almost limitless subject matter jurisdiction, bankruptcy courts have held that they are not bound by the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and that they may exercise personal jurisdiction over persons located anywhere within the United States under 28 U.S.C. 1471(c).[16] *See, e.g., Nixon Machinery Co. v. Roy Energy, Inc.*, 15 Bankr. 131 (Bankr. E.D.Tenn. 1981); *Beasley v. Kelco Foods, Inc.*, 11 Bankr. 1010 (Bankr. D.Del. 1981); *Whippany Paper Board Co. v. Victory Container Corp.*, 15 Bankr. 312 (Bankr. D.N.J. April 3, 1981); *Scott v. Fort Ord Federal Credit Union*, 5 Bankr. 220, 225 (Bankr. W.D.Tenn. 1980); *Line by Dakota, Inc. v. Lebsack*, 8 Bankr. 643 (Bankr. D.S.D. 1981). Indeed, in the present case, Marathon is a Delaware corporation, with its principal place of business in Findlay, Ohio, which does not carry on business in Minnesota and is not amenable to suit in Minnesota state or federal district court.[17] This exercise of nationwide personal jurisdiction over actions to

[16] Bankruptcy courts obtain personal jurisdiction over persons anywhere in the country with service of process by U.S. Mail. Bankruptcy Rule 704. The Department of Justice opposed the expansion of jurisdiction because it thrusts state cases into federal court and would encourage forum shopping. House Hearings, *supra*, at 2097-98 (statement of Richard Lavine, Ass't. Attorney General). Forum shopping may well be encouraged by this extended jurisdiction since insolvency is no longer a requirement to file a petition for reorganization. *Compare* former 11 U.S.C. §§530, 723, 823 with 11 U.S.C. §§301, 1121. Any corporation may, simply by filing a petition, obtain nationwide jurisdiction in a local tribunal for any claim it may have. Similarly, creditors may place a company into involuntary bankruptcy in order to get nationwide jurisdiction over guarantors of the bankrupt corporation.

[17] In proceedings before the bankruptcy court, counsel for Northern filed an affidavit which stated, inaccurately, that appellee Marathon was authorized to do business in Minnesota. Affidavit, dated June 19, 1980. Northern's counsel relied upon the certificate of authority to do business

enforce claims not related to the core federal bankruptcy function of recovering and distributing property or funds which were part of the bankrupt's estate violates both the principle of comity that governs federal-state court relations and the traditional concepts of fairness and substantial justice that have, prior to the Reform Act, limited the exercise of federal personal jurisdiction. *See* Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv.L.Rev. 703, 706-711, 713-715 (1982) (hereinafter "Harvard Note").

In contrast, the two Article I subject matter courts created by Congress have exercised extremely limited powers and jurisdiction. Currently, the United States Court of Military Appeals and the courts-martial it governs are the only Article I subject matter courts whose constitutionality has been upheld by this Court. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858); *O'Callahan v. Parker*, 395 U.S. 258 (1969). Military courts do not infringe upon the principle of separation of powers because the courts' limited function "to maintain discipline in order to carry on their 'primary . . . function' of fighting or being ready to fight wars," *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *O'Callahan*, 395 U.S. at 262-66, has been entrusted solely to the President as Commander-in-Chief and to Congress through its power to declare war, raise armies and "make Rules for the Government and Regulation of the land and Naval forces." U.S. Const. art. I, §8, cl. 14. The military courts have never been considered part of the judiciary, but are agencies of the executive branch, whose decisions are subject to various forms of executive approval and revision, 10 U.S.C. §§864, 871, 872, 874, and, within the limits of their jurisdiction, cannot be controlled or reviewed by civil courts. *See*, *Dynes*, 61

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of a Nevada corporation, not the Delaware corporation which is the defendant-appellee in the present matter. *See* Recording of Proceeding before Bankruptcy Court on June 20, 1980.

U.S. at 79; *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885); C. Wright, *Law of Federal Courts* 13 (3d ed. 1976). The jurisdiction of military courts is limited to violations of the Uniform Code of Military Justice, and the courts' powers are limited to "the least possible power adequate to the end proposed." *Toth*, 350 U.S. at 23. This Court has repeatedly held unconstitutional attempts of military courts to "encroach on the jurisdiction of the federal courts set up under Article III of the Constitution", *id.* at 15, by expanding their jurisdiction beyond the "narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *O'Callahan*, 395 U.S. at 266 (1969); *Toth*, *supra*; *Reid v. Covert*, 354 U.S. 1 (1957); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

The only other Article I court acting within the states is the United States Tax Court. The constitutionality of this court, although questioned,[18] has never been ruled upon by this Court. In an unappealed decision affirming its own status, *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971), the Tax Court, which until 1969 had been "an independent agency in the Executive Branch of the Government", *Id.* at 392, noted that the Tax Court did not infringe upon the separation of powers principle since "'[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled.' *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931)." *Burns*, 50 T.C. at 398. The Tax Court's narrow jurisdiction is "limited to redetermining deficiencies in Federal income, estate, and gift taxes" based upon the Internal Revenue Code. *Id.* at 396. *See also, Continental Equities, Inc. v. Commissioner*, 551 F. 2d 74, 79, 82-84 (5th

[18] *See, e.g.*, Ginsberg, *Is The Tax Court Constitutional?*, 35 Miss. L.J. 382 (1964); Dubroff, *Federal Taxation*, 1973-74 *Ann. Survey of Amer. L.* 265, 272-85 (1974).

Cir. 1977) (no equitable jurisdiction). Not only is the jurisdiction of the court limited, but, unlike the bankruptcy courts, its judicial powers are limited:

> The court presently has no jurisdiction to execute its decision; it does not render a money judgment; it simply determines the amount of the deficiency or overpayment of tax. . . . It has no jurisdiction to exercise the broad common law concept of "judicial power" invested in courts of general jurisdiction by Article III of the Constitution.

Id. at 396.

Furthermore, the Tax Court's limited jurisdiction is entirely consensual. Unlike involuntary defendants in plenary lawsuits before the bankruptcy courts, the taxpayer, by first paying the deficiency and then bringing suit against the government in a United States district court or the Court of Claims, *id.* at 394 n. 7, retains an absolute right to adjudication of his dispute before an Article III tribunal.[19]

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[19] The only other courts ever considered Article I courts acting within the states are the Court of Claims and the Court of Customs and Patent Appeals. *Ex parte Bakelite*, 279 U.S. 438 (1929); *Williams v. United States*, 289 U.S. 553 (1933); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The changing jurisdiction of these courts and Congress' failure to explicitly denominate them Article III courts until the 1950's resulted in confusion over their status until it was finally settled in *Glidden*, *supra*. Both *Bakelite* and *Williams*, drawing on the "public rights" limitation in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), rested on the ground that the collection of duties and payment of claims by the federal government involved the exercise of sovereign power "which may be devolved at the will of Congress upon any of the three departments [and] plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tri-partite distribution of such powers." *Williams*, 289 U.S. at 581. Justice Harlan, writing for a three-judge plurality in *Glidden*, impliedly overruled *Bakelite* and *Williams* and held that the Court of Claims and Court of Customs and Patent Appeals have been Article III courts since their creation. *Glidden*, *supra* at 584. Justice Clark and Chief Justice Warren, concurring, held that the courts became Article III courts

The Constitution does not, as appellants suggest, give Congress great latitude to establish non-Article III federal courts within the states. Historical practice and decisions of this Court demonstrate that it is only in matters involving the power of the sovereign to conduct war, collect taxes or to determine claims against the sovereign — that is, where pure executive or legislative determination does not infringe upon the principle of separation of powers — that Congress may establish non-Article III federal tribunals within the states. At no time in this country's history, however, have bankruptcy proceedings, much less lawsuits initiated by bankruptcy trustees against non-participants in the bankruptcy proceedings, been considered amenable to executive or legislative determination. *See* Katz, *Federal Legislative Courts*, 43 Harv.L.Rev. 894, 916 (1930). Indeed, it has long been recognized that jurisdiction over suits at law and in equity and admiralty may not be delegated to the legislative or executive departments. In *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), this Court stated:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can ... withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.

Id. at 284.

If the final judicial determination of suits between private parties based on state common law contract,

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through the expansion of appellate jurisdiction over matters previously heard in Article III courts and the removal of congressional and executive reference jurisdiction. *Id.* at 585-589.

tort or property claims and the enforcement of monetary or equitable judgments can be entrusted to a legislative or executive officer of the federal government, then there would appear to be no disputes which the federal executive or legislature could not finally determine and enforce in any manner they chose.[20] This is precisely the tyranny of consolidated federal power that the Framers sought to avoid in drafting Article III. The power to pass uniform legislation in limited areas granted by the states to the Congress was never intended to permit such a wholesale appropriation of judicial power by the other branches of the federal government. As both the House Committee on the Judiciary and the Department of Justice concluded, the power to enter and enforce final judgments in the states in all cases "related to" a bankruptcy proceeding cannot constitutionally be vested in the legislative or executive branches of the federal government. *See* House Report, *supra*, at 32, 49; Justice Dep't. Letter, App. A, at 1a-7a. *See also*, Plumb, *supra*, at 1457-69.[21] The vesting of such jurisdiction in a legislative court would "sap the

[20] If Congress' power to create non-Article III federal courts were coextensive with its power to enact legislation, then it "could circumvent entirely the restrictions of Article III simply by establishing a series of untenured, limited jurisdiction courts, such as criminal courts, antitrust courts, labor courts and environmental courts." Krattenmaker, *supra*, at 310. *See Tidewater*, 350 U.S. at 611 (Rutledge, J., concurring) 652 n.3 (Frankfurter J., dissenting); House Report, *supra*, at 86 (letter of H. Wechsler).

[21] While the exercise of expanded jurisdiction by a bankruptcy judge is unconstitutional, under the Reform Act the trustee or debtor may still prosecute any claims he may have in any state or federal district court with jurisdiction over the parties. 11 U.S.C. §323(b); Bankruptcy Rule 610. Thus, affirmance of the district court below would result only in a requirement that a trustee sue a non-participant in the bankruptcy proceedings in an appropriate state or federal court.

judicial power as it exists under the Federal Constitution, and [would] establish a government of a bureaucratic character alien to our system." *Crowell v. Benson*, 285 U.S. 22, 57 (1932).

2. Even assuming for the sake of argument that jurisdiction over claims arising under state laws and laws of national applicability may be vested in the legislative branch of government, the breadth of the jurisdictional grant to a legislative tribunal is neither justified by the needs of the administration of the bankruptcy laws nor basically sound:

> "The bill pours all sorts of litigation into the federal system that belongs in the state courts, and the bankruptcy courts would, in addition, end up deciding all kinds of cases only tangentially related to the bankruptcy laws. In the latter event, bankruptcy expertise is irrelevant and bankruptcy judges are not likely to be well trained in these other fields. For example, the prospect of trying antitrust suits before Article III bankruptcy courts is a bad idea from anyone's standpoint, except, perhaps from the standpoint of bankruptcy lawyers who may appreciate the new business."

House Report, *supra*, at 544 (Additional view of Hon. George E. Danielson, quoting remarks of the Judge Shirley M. Hufstedler).

Fourteen-year terms do not result in more flexibility in meeting an unlikely decrease in the bankruptcy caseload since the average term of Article III judges is 12.1 years. *See* Brief of Amicus of Association of the Bar of the City of New York, Appendix A; Subcommittee Report, *supra*, at 18 n.44. Nor does the need to alleviate bankrupts from the expense of litigating in distant forums justify tampering with the fundamental structure of the American judicial system by creating non-Article III federal courts in the states. A far less drastic solution would be simply to change the venue

requirements of federal district courts to allow trustees to bring a plenary action in the federal district court in the district in which the bankruptcy proceeding is pending.[22]

The splintering of federal court jurisdiction by the creation of specialist trial and appellate courts having overlapping jurisdiction with state and other federal courts encourages forum shopping and "is fundamentally undesirable and contrary to all experience of the past 50 or more years." Judicial Conference of the United States, *Preliminary Report of the Special Committee to Review HR 6, 95th Congress, A Legislative Proposal Relating to Bankruptcy Administration* 6 (April 15, 1977). *See also*, ABA Commission on Standards of Judicial Administration, *Final Draft of Standards Relating to Court Organization*, Standards 1.10, 1.11.

Finally, the independence of the bankruptcy judges and the delicate balance of judicial power between the United States and the several states are matters of "intensely practical" importance. *Glidden v. Zdanok*, 370 U.S. at 589 (Douglas, J., dissenting). Disruption of the balance of power governed by the principles of federalism and comity, *see* Harvard Note, *supra* at 706-13; *see generally*, *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), and the compromise of the complete independence of federal judges who handle matters of national concern cannot be justified on the grounds of efficiency:

> "There is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. Settled doctrine does give some

[22] The Reform Act still requires that many bankruptcy-related proceedings be brought in potentially distant forums. *See* 28 U.S.C. §1473(b), (d), and (e).

> play to such considerations. But when it is remembered that the delicate balance of a federal system is at stake and that expansion of the jurisdiction of the federal courts diminishes the power of the states, it is apparent that efficiency cannot be the sole or the controlling consideration."

C. Wright, *Law of Federal Courts* 2 (3d ed. 1976). *See also, Reid v. Covert*, 354 U.S. 1 (1955) ("[S]tealthy encroachments" on "government of divided authority" cannot be justified on ground that "practical necessity for [slight expansion of jurisdiction] is very great." *Id.* at 39, 40).

D. The bankruptcy courts are not an administrative agency but courts exercising full judicial power over a broad range of subject matter.

Appellants finally contend that the bankruptcy courts may be sustained as an administrative agency. The simple answer is that Congress did not create a bankruptcy administrative agency. Even if Congress had attempted to create such an agency, it could not have empowered the agency to enter final judgments;[23] to conduct jury trials, *see*, House Report, *supra*, at 38 n.248, and 1 Davis, *Administrative Law* §3.10, p. 182 (2d ed. 1978); to issue writs of habeas corpus to free persons who are in the custody of state or federal prisons, *see Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C. J., concurring); to enforce their own monetary awards, subpoenas or legal process without recourse to a constitutional court, *see* Subcommittee Report, *supra*, at 31; *ICC v. Brimson*, 154 U.S. 447, 479,

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[23] In *Crowell v. Benson*, 285 U.S. 22 (1932) this Court held that Article III required a *de novo* review in the district court of contested facts upon which the liability of the defendant in that case depended. The absence of Article III *de novo* redetermination of decisions of the bankruptcy courts violates the principle enunciated in *Crowell* and *Raddatz*, *supra*.

485 (1894); and to exercise all these powers in common law disputes between private citizens.[24] No administrative agency has ever been granted pendent jurisdiction over state law claims against a non-participant in agency proceedings or the broad jurisdiction and full judicial powers purportedly vested in the bankruptcy courts.

CONCLUSION

The purported exercise of expanded jurisdiction by the non-Article III bankruptcy judge over Marathon and the present common law contract and tort claims under 28 U.S.C. §1471(c) violates Article III and its underlying principles of federalism and separation of powers. Therefore, the district court's order dismissing Northern's complaint should be affirmed.

Respectfully submitted,

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[24] In a recent review of the doctrine of *Crowell v. Benson*, *supra* and related cases sustaining administrative fact-findings, this Court stated:

> "Our prior cases support administrative fact-finding in *only* those situations involving 'public rights', *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. *Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.*"

Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 458, (1977) (emphasis added). The dictum in *United States v. Kras*, 409 U.S. 434, 447 (1973) that Congress might remit certain aspects of bankruptcy proceedings to an administrative agency is not applicable to the instant suit at common law and is inconsistent with *Murray's Lessee*, *supra*, and *Atlas Roofing*, *supra*, decided four years after *Kras*.

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